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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

IN RE

ANGEL M. COSME NIEVES, SECUNDINO MACHADO, TOMAS GARCIA, AND LORRAINE GORSKI,

Petitioners

v.

COL. ROBERT C. DESHLER, C.O. FORT BUCHANAN, COL. CLARENCE H. WOLLIVER, C.O. FORT McPHERSON, GA., INSTALLATION CLUB SYSTEM, NON-COMMISSIONED OFFICERS' OPEN MESS, AND/OR COMMUNITY CLUB, Sub-divisions of the INSTALLATION CLUB SYSTEM, Fort Buchanan, Puerto Rico,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SAMUEL C. VAZQUEZ MATIAS
GPO Box 1218
San Juan, Puerto Rico, 00936
(809) 792-0867

HECTOR L. MARQUEZ
416 Ponce de Leon Avenue
Chase Building, Suite 240
Hato Rey, Puerto Rico, 00918
(809) 753-0355

Counsel for Petitioners

May 31, 1986

CASILLAS PRESS INC. – 1717 K STREET NW WASHINGTON DC 20006 – 223-1230

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APPENDIX INDEX

Title	Page
COMPLAINT, PE 82-1381, October 9, 1982, under the Fair Labor Standards Act of 1938, as amended (FLSA), 29 U.S.C. 201, *et seq.*	1a
OPINION AND ORDER, U.S. District Court for the District of Puerto Rico, April 15, 1983	9a
ORDER OF THE COURT, United States Court of Appeals for the First Circuit, August 22, 1983	13a
MEMORANDUM AND ORDER, United States Court of Appeals for the First Circuit, October 7, 1983	14a
OPINION AND ORDER, U.S. District Court for the District of Puerto Rico, January 8, 1985	15a
JUDGMENT, U.S. District Court for the District of Puerto Rico, January 14, 1985	23a
DECISION ON APPEAL, United States Court of Appeals for the First Circuit, March 18, 1986	24a
JUDGMENT, entered March 18, 1986	42a
Pertinent part of Sections 203(d), 206, and 207 of the FLSA	43a
NOTICE OF APPEAL, filed June 5, 1986, U.S. Court of Appeals for the First Circuit	51a

APPENDIX A

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN PART

ANGEL M. COSME NIEVES	*	
SECUNDINO MACHADO, TOMAS	*	Civ. # PE
GARCIA, LORRAINE GORSKI	*	82-1381 1001
Complainants	*	IN RE:
vs.	*	Salaries claim
COL. ROBERT C. DESHLER, C.O.	*	
FORT BUCHANAN, INSTALLATION	*	
CLUB SYSTEM, NON-COMMISSIONED	*	
OFFICERS OPEN MESS, OFFICERS	*	
OPEN MESS, AND/OR COMMUNITY	*	
CLUB, Sub-divisions of the	*	
INSTALLATION CLUB SYSTEM,	*	
FORT BUCHANAN, PUERTO RICO,	*	
COL. CLARENCE H. WOLLIVER,	*	
C.O., FORT McPHERSON, GA.	*	
Defendants	*	

COMPLAINT

TO THE HONORABLE COURT:

Comes now captioned complainants through the subscribing counsel and before this Honorable Court very respectfully state, allege and request:

1. That complainants file the present complaint pursuant to the summary procedure established for this type of claims by Act No. 2 of October 17, 1961, 32 L.P.R.A. 3118 to 3132. The provisions of the 1938 Federal Statute on Reasonable Working Norms, as amended, 298 USCA 201 et seq, apply in the defense of their rights and all the laws of Puerto Rico, of greater benefit, specifically but not limited to Act 379 of May 15, 1948, as amended 29 L.P.R.A. 271 et seq. and Act 96 of June 26, 1956, as amended, 29 L.P.R.A. 245 et seq.

2. That in this case there is no monetary claim against the United States of America, and therefore the judgment to be obtained shall not come from the monies of the Treasury of the United States, and the appearance of Commanding Officer of Fort Buchanan, Col. ROBERT C. DESHLER, and that of Commanding Officer of Fort McPherson, Georgia, Col. CLARENCE H. WOLLIVER as respondents in this suit is due to the deference extended to them, since they are the ultimate custodians of the documents that are to be kept by the rest of the defendants who are persons exempt from immunity, that operate with non-appropriated funds from the Congress of the United States.

3. That the entity or entities, person or persons, other than the two mentioned above, operate one bar or more than one bar, one restaurant or more than one, one or more dancing halls, with facilities for banquets and parties, as well as a division for the sale of liquors, keeping a volume of business in excess of $500,00 per year. As of December 31, 1979, they reporeted a capital growth of $1,656,936.26 over the capital reported as of December 31, 1978 of $6,613,267.44 for a reported total of $8,270,203.70.

4. That this complaint covers the years between June 15, 1972 up to date, and during each of the years included in this complaint, the complainants worked, according to each particular case, in excess of eight (8) hours during a 24 hours period, during the rest period of 16 hours, during the hour for the intake of food, and at time in excess of 40 hours of work per week, and that defendants did not pay complainants for the rendered working hours, as provided by law and at times did not pay complainants any payments for the worked hours. Complainants at times used

accrued vacations hours to complete the minimum of worked hours guaranteed to the worker specifically affected, without previous consent of the worker.

5. That complainant ANGEL M. COSME NIEVES was employed by defendants since approximately June 15, 1972 until approximately October 18, 1981, and according to his best information and belief, defendants owe him an amount not lesser than $20,439.20 for unpaid salaries and an equal amount for penalties or liquid damages, which make a total of $40,878.40.

6. That complainant SECUNDINO MACHADO has been employed by defendants since approximately July 14, 1973 up to date and according to his best information and belief, defendants owe him an amount not lesser than $11,572.86 for unpaid salaries and an equal amount for penalties or liquid damages, which make a total of $23,145.72.

7. That complainant TOMAS GARCIA was employed by the defendants since approximately February 23, 1973 up to approximately February 21, 1981, and according to his best information and belief, defendants owe him an amount not lesser than $16,390.40 for unpaid salaries and an equal amount for penalties or liquid damages, which make a total of $32,780.80.

8. That complainant LORRAINE GORSKI has been employed by defendants since approximately November 4, 1977, up to date and according to her best information and belief, defendant owe her an amount no lesser than $10,106.20 for unpaid salaries and an equal amount for penalties or liquid damges which make a total of $20,212.40.

9. That complainants have claimed from defendants

the payment of the herein claimed salaries, but without any positive result whatever.

IN WITNESS WHEREOF it is very respectfully requested from this Honorable Court that after due legal steps, judgment be issued against defendants for an amount not lesser than $58,508.66 for unpaid salaries and an equal amount for penalties or liquid damages for a total of $117,017.32 up to date, accruing the amount of $57.14 per week, and an equal amount for penalties or liquid damges in favor of the two employees who are still working for defendants, until the final adjudication of this complaint. It is also requested that defendants be sentenced to pay legal interests since the filing of this complaint until its final adjudication, in addition to costs, expenses and a reasonable amount for lawyers fee.

CERTIFICATION: I hereby Certify that at the date of filing I have notified a copy of this Complaint to the Honorable Secretary of Labor, at his address in Hato Rey, Puerto Rico 00919.

In San Juan, Puerto Rico, October 9, 1982.

(sgd.) SAMUEL C. VAZQUEZ MATIAS
GPO Box 1218
San Juan, P.R. 00936

Enclosures: Sworn Statement authorizing this complaint

CERTIFIED:
To be a correct translation prepared by:
/s/ [Illegible] 3-28-83
Official Court Interpreter and Translator
United States District Court
for the District of Puerto Rico

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN PART

ANGEL M. COSME NIEVES	•	
SECUNDINO MACHADO, TOMAS	•	Civ. # PE
GARCIA, LORRAINE GORSKI	•	82-1381 1001
Complainants	•	IN RE:
vs.	•	Salaries claim
COL. ROBERT C. DESHLER, C.O.	•	
FORT BUCHANAN, INSTALLATION	•	
CLUB SYSTEM, NON-COMMISSIONED	•	
OFFICERS OPEN MESS, OFFICERS	•	
OPEN MESS, AND/OR COMMUNITY	•	
CLUB, Sub-divisions of the	•	
INSTALLATION CLUB SYSTEM,	•	
FORT BUCHANAN, PUERTO RICO,	•	
COL. CLARENCE H. WOLLIVER,	•	
C.O., FORT McPHERSON, GA.	•	
Defendants	•	

SWORN STATEMENT

WE, ANGEL M. COSME NIEVES, SECUNDINO MACHADO, TOMAS GARCIA, LORRAINE GORSKI, all of legal age, married to their respective spouses, excepting the last one who is single by divorce, employees and residents of Cataño, Carolina, Santurce and Río Piedras, of the municipality of San Juan, Puerto Rico, under oath state:

1. That our names and other personal circumstances are as stated above.

2. That we have read the complaint, of which this statement is to form an integral part thereof, and everything stated therein is of our own knowledge, excepting what is based in information and belief, which we also think is true in good faith.

3. That as consequence of the preceding paragraph, we

have authorized counselor SAMUEL C. VAZQUEZ MATIAS to file said complaint against the captioned defendants in claim of salaries, as well as to represent us in all the proper procedures for the final adjudication of said complaint.

4. That spite of the fact that counselor SAMUEL C. VAZQUEZ MATIAS has not requested payment, contribution or compensation from us to take this complaint up to its final adjudication, we bind ourselves, provided employer pays us, to help if necessary to defray the necessary expenses to initiate, continue and terminate the required procedures until the final adjudication of the complaint, including but not limited to, the expenses for depositions, the use of experts and their assistants regarding their services, the utilization of those services, inside as well as outside the hearings or meetings that might be necessary, within or without the Court, their hiring for the investigation of payrolls, cards and other documents pertinent to the salaries claim herein filed, as well as in the preparation and final presentation of the evidence or reports at the trial before the Court, or before the forum, agency or place where this complaint be finally adjudicated.

5. That Colonel Clarence H. Wolliver, co-defendant in this Complaint, even though no monetary claim is made against him or against the United States of America, is the final custodian along with Colonel Robert C. Deshler, Commandant of Fort Buchanan, Puerto Rico, of the documents that should be kept by the instrumentality not protected by the Principal, INSTALLATION CLUB SYSTEM, of Fort Buchanan.

6. That in addition to the above, Colonel Clarence H. Wolliver, Commandant of Fort McPherson, Georgia, in his character with authority over the INSTALLATION

CLUB SYSTEM of Fort Buchanan, Puerto Rico, has conducted businesses in Puerto Rico, through his agent and second in command in Fort Buchanan, Puerto Rico, Colonel Robert C. Deshler, allowing the actions that gave rise to this complaint and therefore, Colonel Clarence H. Wolliver, resident of the state of Georgia, is liable to be summoned by edict, and this sworn statement shall serve not only to authorize the complaint but also to request that Colonel Clarence H. Wolliver be summoned by edict.

7. That as can be seen from the complaint and from what shall be alleged further on, the complainants have a just cause against the defendants and the summons by edict of Colonel Clarence H. Wolliver, Commandant of Fort McPherson, Georgia, allows us to bring under the jurisdiction of the Court said appropriate party.

8. That during each and everyone of the years included in the complaint, of which this statement is to form a part thereof, the undersigned complainants worked, according to our particular case, in excess of eight (8) hours n a period of continuous 24 hours, during the rest period of sixteen (16) hours in twenty-four, during the hours of food intake and at time in excess of forty (40) hours in a work week, and defendants did not pay undersigned complainants, according to each particular case, for the rendered worked hours, as provided by law, and at times no payment was made for the worked hours. The defendant-employer at times used accrued vacations hours to complete the minimum of work guaranteed to the worker specifically affected, without the worker's previous consent. At time the defendant-employer paid in compensatory time the hours worked in excess of eight (8) in one day or forty (40) hours in one week, or worked during a legal holiday or during the seventh day.

9. That at other times the defendant-employer only allowed the worker-complainant to work part of the guaranteed term which was an amount of specified hours per week, and did not pay the maximum of guaranteed hours.

10. That employer was requested the payment of salaries claimed in this complaint, and that employer-defendant ignored our payment request.

IN WITNESS WHEREOF, we swear and sign this statement in San Juan, Puerto Rico, October 9, 1982.

(sgd.) ANGEL M. COSME NIEVES
(sgd.) LORRAINE GORSKI
(sgd.) SECUNDINO MACHADO
(sgd.) TOMAS GARCIA

OATH

Affidavit No. 1442

SWORN AND SUBSCRIBED before me by ANGEL M. COSME NIEVES, SECUNDINO MACHADO, LORRAINE GORSKI and TOMAS GARCIA, all of whom are of legal age, married to their respective spouses, employees and residents of Cataño, Río Piedras, and Santurce, Puerto Rico, respectively from left to right, and as to the civil status of LORRAINE GORSKI, who is single by divorce, and they so have expressed today October 9, 1982, in San Juan, Puerto Rico.

(sgd.) ILLEGIBLE
Notary Public

CERTIFIED:
To be a correct translation prepared by:
(sgd.) [Illegible] 3-28-83
Official Court Interpreter and Translator
United States District Court
for the District of Puerto Rico

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

ANGEL M. COSME NIEVES, et al, Plaintiffs	)	
v.	)	CIVIL NO. 83-0196 (PG)
COL. ROBERT C. DESHLER, CO., FORT BUCHANAN, et al, Defendants	)	

OPINION AND ORDER

This matter is before the Court upon the motion of plaintiffs to remand this case to the state court.

On October 13, 1982, plaintiffs filed this action in the Superior Court of the Commonwealth of Puerto Rico. Plaintiffs allege in the complaint that the defendants did not pay minimum and overtime wages, in violation of the Fair Labor Standards Act, (hereinafter FLSA) 29 U.S.C. 201, et seq., and some state statutes. Subsequently, on February 4, 1983, defendants removed the case to this Court pursuant to the provisions of 28 U.S.C. 1441(a) and (b), 1442, 1442(a) and 1446. On February 16, 1983, plaintiffs filed a motion to remand this case to the state court. On April 4, 1983, defendants filed an opposition thereto, which plaintiffs replied on April 8, 1983. The matter is now before the Court for an appropriate disposition of plaintiffs' motion to remand.

In support of their motion to remand plaintiffs contend that actions under the FLSA, 29 U.S.C. 216, may not be removed to the federal court, citing *Rolón* v. *Flexicore Company of Puerto Rico,* 216 F.Supp. 954 (D.C.P.R.,

1963); *Virgilio Avilés, et al* v. *Commanding Officer, U.S. Army Command, Fort Buchanan, Puerto Rico,* Civil No. 77-211; *Zorrilla* v. *Puerto Rican Cement Co.,* 227 F.Supp. 159 (D.C.P.R., 1964); and *Bintrim* v. *Bruce Meriless Electric Co.,* 520 F.Supp. 1026 (D.C.Pa., 1981). Plaintiffs further allege that the case is not removable under Sections 1442 and 1442(a) because there is no claim against any federal officer nor against the United States of America. Defendants in their motion in opposition to the motion to remand assert that the removal of this action is authorized by 28 U.S.C. 1441(a) and (b) and may also be removed pursuant to 28 U.S.C. 1442 and 1442(a). For the reasons which follow, the Court concludes that the case was properly removed pursuant to 28 U.S.C. 1441(a) and (b).[1]

Section 216(b)) of the FLSA provides that an action under the FLSA ". . . may be maintained in any court of competent jurisdiction." With respect to this provision, cases in other jurisdictions are in conflict. Neither the Supreme Court nor the First Circuit Court of Appeals have ever ruled on this issue of removability. The District Court of Puerto Rico in *Carrero* v. *M.S. Kaplan Co.,* 161 F.Supp. 754 (D.C.P.R., 1958) held that an action under the FLSA being a civil action of which the federal district court had original jurisdiction, the same was removable pursuant to 28 U.S.C. 1441(a). Subsequently, in *Rolón, et al* v. *Flexicore Co. of Puerto Rico, Inc., supra,* the Court was of the opinion that the *Carrereo* case misconstrued the language of Section 216(b) of Title 29, U.S.C.A., and that therefore the ruling in that case was incorrect and should not be followed. In *Zorilla* v. *Puerto Rican Cement Co., supra,* the court followed the ruling of the *Rolón* case that

[1]Since we reach this conclusion, it is not necessary to decide whether the case may also be removed under 28 U.S.C. 1442 and 1442(a).

an action under the FLSA is not removable from the state court to the federal court.

The issue has been presented on only one occasion at the appellate level. In *Johnson* v. *Butler,* 162 F.2d 87 (8 Cir., 1947), the court's decision that actions under the FLSA were not removable was based on the language ". . . may be maintained . . .", 29 U.S.C. 216(b), which it interpreted as not only granting the plaintiff the right to file his action in state courts, but also the right to prosecute the action to final judgment in that court. Less than a year after the *Johnson* decision, Congress amended Section 1441(a) to provide that civil actions may be removed "(e)xcept as otherwise expressly provided by Act of Congress. . .", 28 U.S.C. 1441(a). Subsequent to the 1948 amendment to Section 1441(a), few courts have continued to follow the *Johnson* rationale that the use of the term "maintain" in Section 216(b) constitutes an express provision against removal under the FLSA. Among those that have followed the *Johnson* reasoning are the *Rolón* and *Zorilla* cases. However, the growing majority is against interpreting the concurrent jurisdiction clause of the FLSA to prohibit removal because Section 1441 requires an express statement to that effect in the federal statute, e.g., *Hill* v. *Moss-American, Inc.,* 309 F.Supp. 1175 (N.D.Miss., (1970); *Anthony* v. *West Coast Drug Co.,* 331 F.Supp. 1279 (W.D.Wash., 1971); *Niswander* v. *Paul Hardeman, Inc.,* 223 F.Supp. 74, 76 (E.D.Ark., 1963); *Jacobi* v. *High Point Label, Inc.,* 442 F.Supp. 518 (M.D.N.C., 1977); *Taylor* v. *Brown,* 461 F.Supp. 559 (E.D.Tenn., 1978). The Court concludes that the better reasoned position is the one followed by the majority. Thus, it being that this civil action is one over which the Court has original jurisdiction under Title 28 U.S.C.A 1337 and under Section 16(b) of

the FLSA (29 U.S.C.A. 216(b))[2] and over which defendants had the right to remove to this Court pursuant to 28 U.S.C.A. 1441(a) and (b), plaintiffs' motion to remand should be denied.

In view of the above, the Court ORDERS that plaintiffs' motion to remand be and is hereby DENIED.

IT IS SO ORDERED.

San Juan, Puerto Rico, April 15, 1983.

(sgd.) Juan M. Perez-Gimenez
JUAN M. PEREZ-GIMENEZ
U.S. District Judge

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[2]Section 218(b)(2) of the FLSA, Title 29 U.S.C., permits a wage claim against non-appropriated fund instrumentalities such as defendants' herein. See *Morales* v. *Senior Petty Officers' Mess*, 366 F.Supp. 1305 (D.C.P.R., 1973).

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1351. Orig.

IN RE

ANGEL M. COSME NIEVES, ET AL.,
Petitioners.

BEFORE CAMPBELL, *Chief Judge,*
COFFIN AND BOWNES, *Circuit Judges.*

ORDER OF COURT

Entered August 22, 1983

No exceptional circumstances exist which warrant disregarding the policy against piecemeal appellate review. *See Ex parte Harding,* 219 U.S. 363 (1911); *Poirrier* v. *Nicklos Drilling Co.,* 648 F.2d 1063 (5th Cir. 1981). The possibility of relitigation is insufficient. *In re Continental Investment Corp.,* 637 F.2d 1, 5-6 (1st Cir. 1980). Consequently, the petition for a writ of mandamus or certiorari is denied.

By the Court:

Francis P. Scigliano
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1351. Orig.

IN RE

ANGEL M. COSME NIEVES, ET AL.,
Petitioners.

MEMORANDUM AND ORDER

Entered October 7, 1983

We adhere to our decision that the possibility of relitigation (should, after a trial on the merits, plaintiff prove correct on the removal issue) is insufficient to invoke the collateral order doctrine. We add that, in light of the fact that, in addition to the provision for interpreters, all the regular judges and jurors of the United States District Court are fully conversant in Spanish, we do not consider any difficulties encountered by Spanish speaking litigants to constitute exceptional circumstances justifying interlocutory review."

The request for reconsideration is denied.

By the Court:

Francis P. Scigliano
Clerk.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ANGEL M. COSME-NIEVES, et al,	)	
	)	
Plaintiffs	)	
	)	
v.	)	CIVIL NO.
	)	83-0196(PG)
COLONEL ROBERT C. DESHLER, CO., FORT BUCHANAN, et al.,	)	
	)	
	)	
Defendants	)	
	)	

OPINION AND ORDER

Present before the Court is defendants' motion to dismiss the claims of plaintiffs Angel M. Cosme-Nieves, Secundino Machado, Tomás García, and Lorraine Gorski, non-appropriated fund employees of the Fort Buchanan Installation Club System.

Plaintiffs commenced this action in the Superior Court of Puerto Rico, San Juan Part, on October 13, 1982. They seek to recover allegedly unpaid wages in the amount of $58,508.66 and liquidated damages in an equal amount. Plaintiffs also seek an unspecified amount in interest, costs, expenses and attorney's fees. Plaintiffs base their claims on the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq,* (hereafter "FLSA") and all laws of the Commonwealth of Puerto Rico providing greater benefits to employees. The defendants are Robert C. Deshler, Commanding Officer, Fort Buchanan; Colonel Clarence H. Wolliver, Commanding Officer, Fort McPherson, Georgia; the Fort Buchanan Installation Government of the United States and the Non-Commissioned Officer's Open

Mess and Officer's Open Mess, both subdivisions of the Installation Club System.[1]

On February 4, 1983, the defendants filed a Petition removing the case to this Court. On February 15, 1983, plaintiffs, by motion, requested remand to the Commonwealth Court. The Court denied plaintiffs' request to remand.[2]

Plaintiffs base this action on 29 U.S.C. § 218,[3] 29

[1]Since the inception of this suit, Colonel Deshler and Colonel Wolliver have been reassigned from their respective duty positions. They were both named as defendants in their official capacities.

[2]Plaintiffs sought a Writ of *Mandamus* or *Certiorari* from the United States Court of Appeals for the First Circuit to reverse the decision not to remand. It was denied. (1st Cir. August 22, 1983) (No. 83-1351). Plaintiffs requested the First Circuit to reconsider its decision, which was also denied. (1st Cir. October 7, 1983) (No. 83-1351).

[3]29 U.S.C. § 218 provides:

> (a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall jutify any employer noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard etablished under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.
>
> (b) Notwithstanding any other provision of this chapter (other than section 213(f) of this title) or any other law—
>
> (1) any Federal employee in the Canal Zone engaged in

U.S.C. § 216(b)[4] and the "more beneficial" laws of Puerto Rico.[5] The government moves to dismiss this action on the grounds that plaintiffs fail to state a claim upon which re-

---

employment of the kind described in section 5102(c)(7) of Title 5, or

(2) any employee employed in an nonappropriated fund instrumentality under the jurisdiciton of the Armed Forces, shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in section 206(a)(1) of this title (except) that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation hourly rate not less than the overtime rate provided for in section 207(a)(1) of this title.

[4]29 U.S.C. § 216(b) provides:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violate the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

[5]The "more beneficial" laws which plaintiffs submit are applicable are 29 L.P.R.A. § 273, 274.

lief may be granted and because the Court lacks subject matter jurisdiction.[6]

The government alleges that plaintiffs have failed to state a claim upon which relief may be granted for two reasons. First, the government submits that plaintiffs have failed to name a proper defendant. Second, the government challenges the applicability of the "more beneficial" laws of the Commonwealth of Puerto Rico concerning overtime compensation.

Both plaintiffs and the government agree that the proper defendant is the employer. The critical question is who is the employer under the FLSA. Plaintiffs repeatedly argue that under the FLSA, they have the option of choosing either the United States or the non-appropriated fund instrumentality, the Installation Club System, as the defendant. Plaintiffs also argue that the United States cannot be the defendant in this case. These diverse positions are inherently contradictory and not credible.

It is absolutely contradictory for plaintiffs to assert that under the same statutory provision the United States can and cannot be the employer and a proper defendant. Additionally, adding to the contradiction, plaintiffs further assert that the Installation Club System is also the employer under the FLSA. This means that plaintiffs had separate employers while performing indentical duties and receiving one paycheck. This is not realistically or logically supportable.

Plaintiffs contend that this Court's decision in *Morales*

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[6]In the alternative, the government contends that the statute of limitations as found in 29 U.S.C. § 255, barred all claims prior to October 13, 1980. Plaintiffs submit that there is a ten-year statute of limitations under 29 L.P.R.A. § 246(a)-(3). This issue need not be addressed in light of the Court's decision.

v. Senior Petty Officer's Mess, 366 F.Supp. 1305 (D.P.R. 1973), supports the position that the Installation Club System is the proper defendant. Plaintiffs' reliance on *Morales* is clearly misplaced. Plaintiffs' action here is based on 29 U.S.C. § 218(a). The Court in *Morales* was only concerned with 29 U.S.C. § 218(b)(2) and whether the United Staets had waived sovereign immunity for non-appropriated fund instrumentalities of the Armed Forces. More significantly, when *Morales* was decided in 1973, the United States was specifically excluded from the definition of the term "employer" under 29 U.S.C. § 203(d). Unquestionably, the 1974 amendments to the FLSA include the Government of the United States within the definition of "employer".

Under the FLSA, non-appropriated fund employees are employees of the Government of the United States. The plain language of 29 U.S.C. § 203(e) cannot be interpreted otherwise.[7] The United States as the employer is the pro-

[7] 29 U.S.C. § 203(e) provides in part:

> (e)(1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.
>
> (2) In the case of an individual employed by a public agency, such term means–
>
> (A) any individual employed by the Government of the United States –
>
> (i) as a civilian in the military departments (as defined in section 102 of Title 5),
>
> (ii) in any executive agency (as defined in section 105 of such title),
>
> (iii) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service,
>
> (iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or
>
> (v) in the Library of Congress;

per defendant. Plaintiffs have failed to name the United States as the defendnat.

The government has also presented two exhibits with its Motion to Dismiss. These exhibits are letters from the Department of Labor and Human Resource for the Commonwealth of Puerto Rico concerning the applicability of Act No. 379 of 1948 and the mandatory decrees promulgated by the Minimum Wage Board under the authority of Act No. 96 of 1956 (Minimum Wage Law).[8] In both letters, it was the Department of Labor and Human Resources' position that the aforementioend Acts are not applicable to federal employees in Puerto Rico. The provisions of the laws of the Commonwealth of Puerto Rico concerning minimum wages specifically exclude persons employed by the Government of the United States and the Commonwealth of Puerto Rico.[9] Act No. 379, which contains the provisions establishing overtime and rates of overtime compensation, excludes employees of the Commonwealth Government and other governmental bodies.[10]

[8]The first letter is dated July 23, 1980, and is signed by the then Secretary for the Department of Labor and Human Resources, Carlos S. Quirós. The second lettrer is dated June 4, 1984, and is signed by Julio Cruz Rodríguez for the Solicitor of Labor.

[9]29 L.P.R.A. § 246e provides in part:

> (a) *This act shall not apply to:*
>
> (1) .....
>
> (2) *Persons employed by the Government of the United States of America* or by the Government of the Commonwealth of Puerto Rico, with the exception of those agencies or instrumentalities of the latter which operate as private businesses or enterprises: . . . .

[10]29 L.P.R.A. § 285 provides in part:

> The provisions of this Act shall not apply to the employees of the Commonwealth Government, the Municipal governments, the Government of the Capital, or of the agencies or instrumentalities of said governments, excepting

When the Commonwealth Government excludes itself and other entities from the application of Act No. 379 and twice expresses the opinion that Act No. 379 does not apply to federal employees, there is no justifiable basis for plaintiffs' assertion that the so-called "more beneficial" laws apply to federal employees. A responsible reading of the "more beneficial" laws, buttressed by the unequivocal opinon of the Department of Labor and Human Resources, leads the Court to the inescapable conclusion that plaintiffs do not have a cause of action under 29 U.S.C. § 218(a).

The government also contends that the Court lacks subject matter jurisdiction because the proper jurisditional basis for this action is the Tucker Act, 28 U.S.C. § 1346(a)(2).[11] This Court agrees.

As previously addressed, the proper defendant is the Government of the United States. Each plaintiff's claim is in excess of $10,000 in backpay and damages. Plaintiffs admit that this case arises under an Act of Congress. The Court's jurisdiction is limited under 28 U.S.C. § 1346(a)(2) to claims not exceeding $10,000 in amount.

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such agencies or instrumentalities as are devoted to agricultural, industrial, commercial or public-service enterprises.

[11] 28 U.S.C. § 1346(a) provides in pertinent part:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The United States Claims Court, under 28 U.S.C. § 1491, has exclusive jurisdiction over all non-tort claims against the United States for money damages in excess of $10,000. *Graham v. Henegar,* 640 F.2d 732, 734, nn. 5, 6 (5th Cir. 1981). It should be noted that plaintiffs admit the United States Claims Court has exclusive jurisdiction if plaintiffs "elected" to choose the United States as the defendant.[12] It is particularly disturbing that plaintiffs' counsel have extensively engaged the resources of the Court on the baseless conception that under the same statute plaintiffs can "elect" both defendants and forums.

In view of the above, the Court ORDERS that the Government's motion be and is hereby GRANTED and that this action be and is hereby DISMISSED.

The Court FURTHER ORDERS costs against plaintiffs.

IT IS SO ORDERED.

San Juan, Puerto Rico, January 8, 1985.

/s/ Juan M. Perez-Gimenez
JUAN M. PEREZ-GIMENEZ
Chief U.S. District Judge

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[12]Plaintiffs' state in their voluminous opposing brief, at pp. 42, 43:

> Should the employees elect this option [suit against the United States]; then, they [plaintiffs] would be required to file with the Court of Claims. *This is an option which plaintiffs did not elect for obvious* reasons.

Plaintiffs' counsel also asserted that they did not sue the United States because they were not inclined or willing to do so. Such a cavalier attitude in bringing judicial actions is totally unacceptable.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ANGEL M. COSME-NIEVES, et al,	)	
	)	
Plaintiffs	)	
	)	
v.	)	CIVIL NO.
	)	83-0196(PG)
COLONEL ROBERT C. DESHLER, CO., FORT BUCHANAN, et al.,	)	
	)	
	)	
Defendants	)	
	)	

JUDGMENT

The Court having entered an Opinion and Order through the Hon. Juan M. Peréz-Giménez,

IT IS ORDERED AND ADJUDGED that this action be dismissed; and

IT IS FURTHER ORDERED AND ADJUDGED that costs be against plaintiffs.

SO ORDERED.

San Juan, Puerto Rico, January 14,1985.

/s/ Ramon A. Alfaro
RAMON A. ALFARO
Clerk of the Court

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1095

ANGEL M. COSME NIEVES, ET AL.,

Plaintiffs, Appellants,

v.

COL. ROBERT C. DESHLER, ETC., ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Juan M. Perez-Gimenez, *U.S. District Judge*]

[561 F. Supp. 1173 (1983)]

[601 F. Supp. 100 (1985)]

Before

Campbell, *Chief Judge,*

Coffin and Torruella, *Circuit Judges.*

Samuel C. Vazquez Matias with whom *Hector L. Marquez* was on brief for appellants.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, and *Robert A. Reutershan,* Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, on supplemental brief for the United States.

Vincent E. Reilly, Office of the Judge Advocate General, Department of the Army, with whom *Francisco A. Besosa,* Assistant United States Attorney, and *Daniel F. Lopez Romo,* United Staes Attorney, were on brief for appellees.

March 18, 1986

CAMPBELL, *Chief Judge.* Plaintiffs-appellants Angel M. Cosme Nieves, Secundino Machada, Tomas Garcia, and Lorraine Gorski, all employees of defendant-appellee Fort Buchanan Installation Club System ("FBICS"), brought an action for back pay and damages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* (1982), and the labor laws of Puerto Rico. They now appeal from the district court's dismissal of their action for want of jurisdiction and for failure to state a claim upon which relief could be granted. *Cosme Nieves* v. *Deshler,* 601 F. Supp. 100 (D.P.R. 1985). Plaintiffs also appeal from the district court's denial of their motion to remand the case to the Commonwealth courts. *Cosme Nieves* v. *Deshler,* 561 F. Supp. 1173 (D.P.R. 1983).

I.

Defendant FBICS operates the Commissioned Officers' Open Mess, the Non-Commissioned Officers' Open Mess, and the Package Beverage Branch at the Fort Buchanan military base in Puerto Rico.[1] All parties agree that FBICS is a non-appropriated fund instrumentality ("NAFI") of the Government of the United States; that is, its monies do not come from congressional appropriation but rather primarily from its own activities, services, and product sales. *See United States* v. *Hopkins,* 427 U.S. 123, 125 n.2 (1976) (per curiam); *Perez* v. *Army & Air Force Exchange Service,* 680 F.2d 779, 780-81 (D.C. Cir. 1982). It is also un-

[1]Each of these subdivisions is also named as defendant.

disputed that FBICS is under the jurisdiction of the Armed Forces.[2]

On October 13, 1982, plaintiffs filed the present action in the Sueprior Court of Puerto Rico seeking back pay in the amount of $58,508.66 and liquidated damages in an equal amount, as well as interest, costs, expenses, and attorneys' fees. Each plaintiff seeks from FBICS damages in excess of $10,000 for failure to have paid proper wages and overtime, in alleged violation of section 18 of the FLSA, 29 U.S.C. § 218 (1982), and also of certain supposedly more beneficial provisions of the laws of Puerto Rico, P.R. Laws Ann. tit. 29, § 245 *et seq.* & § 271 *et seq.* (1985).

Defendants removed the case to the United States District Court for the District of Puerto Rico on February 4, 1983. The district court denied plaintiffs' motion for remand to the superior court, and retained jurisdiction, finding that it had original jurisdiction of the action under 28 U.S.C. § 1337 (1982),[3] that removal had been proper under 28 U.S.C. § 1441(a) (1982),[4] and that there was no express provision prohibiting removal. On August 22, 1983, this court denied plaintiffs' petition for a writ of mandamus.

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[2]Colonel Robert C. Deshler, then present commanding officer of Fort Buchanan, and Colonel Clarence H. Wolliver, a past commanding officer of Fort Buchanan, are also defendants.

[3]28 U.S.C. § 1337 provides district courts with original jurisdiction over actions "arising under any Act of Congress regulating commerce," such as the FLSA. We note that jurisdiction could also be based on 28 U.S.C. § 1331 (1982), since a claim under the FLSA "arises under the Constitution, laws, or treaties of the United States . . . ."

[4]"Except as other expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction . . . may be removed by the defendant or the defendants . . . ." 28 U.S.C. § 1441().

On January 14, 1985, the district court on defendants' motion dismissed the case for lack of jurisdiction and for failure to state a claim upon which relief could be granted. The court reasoned that the Government of the United States was plaintiffs' actual "employer," and hence was the only proper defendant in a suit brought under the FLSA. Moreover, the court found that because plaintiffs' individual claims each exceeded $10,000, federal jurisdiction over their claims lay exclusively in the United States Claims Court under 28 U.S.C. § 1491 (1982).[5] The court also determined that plaintiffs did not have a claim under section 218(a) of the FLSA and the Puerto Rico laws. This appeal followed.

In their original appellate briefs, and in oral argument before this court, defendants, represented by the office of the Judge Advocate General of the Department of the Army, urged us to affirm the district court's ruling that the United States was the proper defendant and that the Claims Court had exclusive jurisdiction over the suit. They further contended that exclusive jurisdiction over this appeal lay solely in the United States Court of Appeals for the Federal Circuit under 28 U.S.C. § 1295(a)(2) (1982) because the district court allegedly based its jurisdiction on 28 U.S.C. § 1346(a)(2) (1982).

Because it was unclear to us whether arguments being made on behalf of defendants on these arcane jurisdictional issues reflected the settled views of the federal government, rather than of simply the Department of the Army, we requested the Solicitor Genearl to file a sup-

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[5]District Courts have jurisdiction concurrent with the United States Claims Court over non-tort claims against the United States only if they do not exceed $10,000 in amount. 28 U.S.C. § 1346(a)(2) (1982).

plemental brief.[6] On December 13, 1985, the Department of Justice submitted on behalf of the United States a comprehensive brief which concedes, as plaintiffs have argued all along, that the NAFI is a proper defendant under the FLSA, and that the district court rather than the Claims Court has jurisdiction over this suit. Defendants have subsequently advised us that they now accept this position as their own. Hence the only issues remaining in contention betweeen the parties are whether the case was properly removed from the Superior Court of Puerto Rico to the federal district court, and whether certain rulings by the district court on the merits of plaintiffs' claims should be sustained.

II.

A. **Jurisdictional Issues**

While defendants no longer argue that this case should have been brought in the Claims Court as an action exclusively against the United States or that the Federal Circuit Court of Appeals has sole jurisdiction over this appeal, we must, of course, decide these issues for ourselves, since the parties cannot, by consent, confer jurisdiction on a court. *See, e.g., Sosna* v. *Iowa,* 419 U.S. 393, 398 (1975). After reviewing the government's supplemental brief and the relevant authorities with care, we accept the Attorney General's position on these issues. Accordingly, we reverse the district court's dismissal of plaintiffs' FLSA claims for lack of jurisdiction. We hold also that this appeal is properly before this court.

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[6]We noted in our request that "[b]ecause NAFI's are used throughout the military, as well as in other branches of government, we feel it important that this court be assured that it is receiving the considered view, formed at an appropriate level, of the Justice Department concerning the proper disposition of this case." We also pointed out that there were precedents from the former Court of Claims, not discussed in defendants' original brief, which seemed at variance with the position defendants were then taking.

The district court found, in keeping with the contentions then being urged by defendants, that the action was in effect a "claim against the United States founded . . . upon . . . [an] Act of Congress," and must therefore be presented to the Claims Court under the Tucker Act, since the claims exceeded $10,000 in amount. 28 U.S.C. § 1491(a).[7] At first blush, this analysis might seem to be correct. NAFIs, after all, are " '[a]rms of the federal government deemed by it essential for the performance of governmental functions' ";[8] and a claim for money damages against a federal instrumentality acting within its statutory authority is usually treated as an action against the United States, since the judgment, if any, must be paid from the public treasury. *See Dugan* v. *Rank,* 372 U.S. 609, 620 (1963); *Butz Engineering* v. *United States,* 499 F.2d 619, 621-23 (Ct. Cl. 1974) (citing cases). Moreover, because the FLSA defines the term "employee" as including "any individual employed by the Government of the United States" in, *inter alia,* a "nonappropriated fund instrumentality,"

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[7]The Tucker Act waives the sovereign immunity of the United States to suit and grants the Claims Court jurisdiction over,

> any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States . . . . For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchange, or Exchange Councils of the National Aeronautics and Space Administration . . . shall be considered an express or implied contract with the United States.

28 U.S.C. § 1491(a).

[8]*Army & Air Force Exchange Service* v. *Sheehan,* 456 U.S. 728, 733 (1982) (quoting *United States* v. *Mississippi Tax Comm'n,* 421 U.S. 599, 606 (1975)); *see also Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485 (1942).

29 U.S.C. § 203(e)(2)(A)(iv) (1982),[9] the district court could believe, as it did, tha the "real" employer under the FLSA was the United States rather than the NAFI by and for whom the employees were actually hired to work.

But while we can appreciate the district court's reasoning, we believe it was erroneous insofar as it was based on the premise that a district court lacks jurisdiction to entertain a FLSA action against a NAFI itself *and its nonappropriated funds* (which is the kind of action we construe this to be). Because NAFIs are supported by "nonappropriated" funds rather than monies from the public treasury, they constitute a special breed of federal instrumentality, which cannot be fully analogized to the typical federal agency supported by appropriated funds.

First, it has long been held that, absent special legislation, the federal government does not assume the financial obligations of a NAFI, as it does those of a federal agency funded in the usual way from congressional appropriations. *See Hopkins* v. *United States,* 427 U.S. 123, 127 (1976) (per curiam); *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485 (1942). As a consequence, because judgments rendered by the Claims Court can be paid only from appropriated funds, 28 U.S.C. § 2517(a) (1982), the Claims Court has held that it lacks jurisdiction to grant judgments against the United States in favor of NAFI

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[9] 29 U.S.C. § 203(e) provides in part:

> (1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.
>
> (2) In the case of an individual employed by a public agency, such term means –
>
> (A) any individual employed by the Government of the United States –
>
> (iv) in a nonappropriated fund instrumemtality under the jurisdiction of the Armed Forces . . . .

plaintiffs except in those instances where Congress has made special provision.[10]

Second, NAFIs are also special in that they are revenue-producing entities that take in and disburse funds generated by their own activities (here, we are told, primarily through the sale of food and beverages). Congress, in fact, has clearly expressed its intention that no appropriated funds be used to support NAFI activities, and thus that their "nonappropriated" funds be severed from general federal revenues. *See Hopkins,* 427 U.S. at 125; *Swiff-Train Co.* v. *United States,* 443 F.2d 1140, 1141 (1971).[11] Because NAFI funds, therefore, have an identity apart from that of treasury funds, NAFIs may be subject to claims directly against them and their nonappropriated assets, as distinct from claims against the United States and the public fisc. *See Rivera* v. *Installation Club System,* 623 F. Supp. 269 (D.P.R. 1985) (permitting suit against NAFI itself).[12]

Apparently relying on the foregoing special characteristics of NAFIs, the Attorney General, in his supplemental brief, has abandoned defendants' earlier position that the

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[10]*See, e.g., McCloskey & Co.* v. *United States,* 530 F.2d 374 (Ct. Cl. 1976); *Kyer* v. *United States,* 3698 F.2d 714 (Ct. Cl. 1966), *cert. denied,* 387 U.S. 929 (1967); *Keetz* v. *United States,* 168 Ct. Cl. 205 (1964).

[11]*Compare L'Enfant Plaza Properties, Inc.* v. *United States,* 668 F.2d 1211, 1212 (Ct. Cl. 1982) (holding that a suit against a financially self-sufficient agency, where governing legislation does not preclude congressional appropriations, is a suit against the United States); *Breitbeck* v. *United States,* 500 F.2d 556, 559 (Ct. Cl. 1974) (holding that a suit against a self-supporting federal corporation where there is no "clear cleavage" between its funds and those of the United States is a suit against the United States).

[12]*Cf. Industrial Indemnity, Inc.* v. *Landrieu,* 615 F.2d 644, 646 (5th Cir. 1980) (per curiam) (permitting suit against Secretary of HUD rather than the United States, where statute provided for such a suit and any judgment was recoverable from *separate* funds in the Secretary's possession and control) (citing cases).

action lay exclusively against the United States, contending now that it was proper for plaintiffs to have sued the employing NAFI itself, to the extent of its nonappropriated funds. In taking this position, the Attorney General points out that the FLSA provides that actions "may be maintained against *any employer (including a public agency) in any Federal or State court of competent jurisdiction.*" *29 U.S.C.* § 216(b) (1982) (emphasis added). *See also* 29 U.S.C. § 203(d) (1982) (an "employer" includes a "public agency").[13] Since a NAFI meets this definition of a public agency employer, the Attorney General asserts that, in the absence of Tucker Act jurisdiction, the NAFI is suable in its own name and right with respect to its nonappropriated funds. Indeed, the Attorney General announces in his supplemental brief that "if this case is transferred to the Claims Court, [the government] will take the position that that court does not have jurisdiction over this case."

Given the Attorney General's view that A NAFI is suable in its own right, and given the precedents indicating that it would, at very least, be an uphill battle to sue the United States in the Claims Court for alleged violations of the FLSA, we hold that it was error for the district court to dismiss on the ground that plaintiffs were obliged to have brought this action in the Claims Court against the United States. In so saying, we stop short of deciding whether a Claims Court action against the United States might have been possible, given the fact that the FLSA waives the sovereign immunity of the United States to suit by its employees and that NAFI employees are described in the

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[13]Act of April 8, 1974, Pub. L. No. 93-259, § 6(a)(1), 1974 U.S. Code Cong. & Ad. New (88 Stat.), 55, 59. An "employer" is currently defined to

> include [ ] any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . .

29 U.S.C. § 203(d) (1982).

FLSA as being employed by the United States government. We hold only that plaintiffs are entitled to proceed in the district court against their immediate employer, the NAFI itself, to the extent of its nonappropriated funds.

In reaching this result, we agree with the Attorney General that jurisdiction for the district court to hear this action is to be found in 28 U.S.C. § 1331 (federal question). *See also* 28 U.S.C. § 1337.[14] The Claims Court, to be sure, has exclusive jurisdiction under the Tucker Act over money claims exceeding $10,000 if brought against the United States, *see* 28 U.S.C. § 1491(a);[15] *see also Doe* v. *United States Department of Justice,* 753 F.2d 1093, 1101 (D.C. Cir. 1985); *Graham* v. *Henegar,* 640 F.2d 732, 734-35 (5th Cir. 1981); *American Science & Engineering, Inc.* v. *Califano,* 571 F.2d 58, 62 (1st Cir. 1978). This claim, however, is brought against the NAFI itself and its nonappropriated funds and, as already explained, the NAFI is not a mere incarnation of the United States but, having separate "nonappropriated" funds of its own, is to that degree a separate, suable entity. This case does not fit, moreover, within the limited exception in the Tucker Act permitting actions based on contracts with certain NAFIs to be treated as claims against the United States.[16] Hence,

[14]*See* note 3 *supra.*

[15]For the text of 28 U.S.C. § 1491(a), see note 7, *supra.*

[16]The Tucker Act was amended in 1970 to state that an express or implied *contract* with the NAFIs specifically named in section 1491(a) should be considered an express or implied contract with the United States, allowing suits on such contracts to be brought in the Court of Claims. *See* Pub. L. No. 91-350, 84 Stat. 449. For text, see note 7, *supra.* But as the government's brief points out, "[n]othing in the language of the . . . amendment or its legislative history gives any indication that . . . Congress had any intention to allow Tucker Act actions by NAFI employees based upon the Constitution, an Act of Congress, or a regulation or an executive department . . . ." A FLSA action is one based upon an Act of Congress, not upon a contract and the NAFI defendant here is not one of the NAFIs to which the Tucker Act exception applies.

we accept the Attorney General's view that there is no reason to deprive the district court of its ordinary jurisdiction under 28 U.S.C. §§ 1331 or 1337. In the FLSA the United States has clearly waived the sovereign immunity of federal agencies, icluding NAFIs, to suit by their employees. *See* 29 U.S.C. § 216(b);*Zumerling* v. *Devine,* 769 F.2d 745, 748 (Fed. Cir. 1985). We therefore conclude that this action may be maintained in the district court against the NAFI.

It also follows that this appeal is correctly before this court rather than before the United States Court of Appeals for the Federal Circuit as defendants once contended (*viz.*, before rethinking their position in light of the Attorney General's supplemental brief). The Federal Circuit Court has sole jurisdiction over "an appeal from a final decision of a district court of the United States . . . if the jurisdiciton of that court was based, in whole or in part, on section 1346 of [title 28 of the United States Code] . . . ." 28 U.S.C. § 1295(a)(2). Here, since the claims exceeded $10,000 in amount, district court jurisdiction could not possibly be based on section 1346(a). The district court so recognized, but then went on to determine, erroneously we now believe, that the United States Claims Court had exclusive jurisdiction under 28 U.S.C. § 1491. As we must reject the existence of exclusive Claims Court jurisdiction, *see supra,* and instead find jurisdiction in the district court under 28 U.S.C. § 1331 and § 1337, it follows that section 1295(a)(2) is irrelevant to this appeal, which is properly in our court under 28 U.S.C. § 1291.

B. **Removal of Case**

Plaintiffs continue to assert that the district court should have remanded the case back to the Commonwealth courts since Congress intended to bar the removal

of cases arising under the FLSA. In support, they rely principally on the particular phrasing in the Act that a FLSA suit "*may be maintained* in any Federal or State court of competent jurisdiction." 28 U.S.C. § 216(b) (emphasis added). Plaintiffs assert that the use of "maintained" means not simply that state and federal courts share concurrent jurisdiction over FLSA suits but also that Congress intended that any FLSA action begun in a state (or Commonwealth of Puerto Rico) court be concluded there.

It is true that prior to 1948 the one circuit court that addressed the issue found the language significant and held that Congress intended to prohibit the removal of FLSA actions. *See Johnson* v. *Butler Brothers,* 162 F.2d 87 (8th Cir. 1947). In 1948, however, Congress amended the general removal statute to provide that civil actions may be removed "[e]xcept as otherwise *expressly provided* by Act of Congress." 28 U.S.C. § 1441(a) (emphasis added). While courts remain split, the weight of subsequent case law is in favor of permitting FLSA cases begun in state courts to be removed to the federal courts pursuant to the authority contained in section 1441(a).[17] *See generally* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure,* § 3729, at 496-97 nn.56-57 (2d ed. 1985) (collecting cases); Annot., A.L.R. Fed. 919 (1972 & Supp. 1985).

As the first circuit court to face this issue since the 1948 amendment, we find ourselves in agreement with those district courts that have allowed removal. Section 1441(a)

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[17]District Courts in Puerto Rico have adopted the position favoring removal, *see Zorrilla* v. *Puerto Rican Cement Co.*, 2278 F. Supp. 159 (D.P.R. 1964); *Rolon* v. *Flexicore Co.*, 216 F. Supp. 954 (D.P.R. 1963), as have district courts in the Second Circuit, *see Sicinski* v. *Reliance Funding Corp.*, 461 F. Supp. 649 (S.D.N.Y. 1978); *Asher* v. *William L. Crow Construction Co.*, 118 F. Supp. 495 (S.D.N.Y. 1953).

explicitly states than an express provision by Act of Congress is required to preclude the right to removal. We think the words "expressly provided" must be construed to mean exactly that. *See Pueblo International, Inc.* v. *DeCardona,* 725 F.2d 823, 827 (1st Cir. 1984). Lacking an explicit statutory directive by Congress that the customary right to remove is abrogated in the instance of FLSA suits,[18] we decline to prohibit their removal. The words "may be maintained" are ambiguous; at best they are suggestive. They are not an express provision barring the exercise of the right to removal. If Congress wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms,[19] and it could easily have done so here.

We are aware that sensible policy arguments can be made against the removal of FLSA suits, although reasonable arguments the other way can also be marshalled. *See Sicinski* v *Reliance Funding Corp.,* 461 F. Supp. 649 (S.D. N.Y. 1978); *Hill* v. *Moss-American, Inc.,* 309 F. Supp. 1175, 1178 (N.D. Miss. 1970). But Congress has made it plain that the right of removal is to stand absent an express

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[18]In support of their argument that removal is prohibited, plaintiffs point to a statement in the Senate Committee report to Pub. L. No. 85-544 that "Congress itself has recognized the inadvisability of permitting removal of cases" arising under such laws as the FLSA. *See* S. Rep. No. 1830, 85th Cong., 2d Sess. 9, *reprinted in* 1958 U.S. Code Cong. & Ad. News 3106. But the amendment under discussion involved 28 U.S.C. § 1445, making state workmen's compensation cases non-removable, and neither 28 U.S.C. § 1441 nor 29 U.S.C. § 216(b) is mentioned or affected by the amendment. At best the statement is no more than an "oblique reference" without any documentation whatever. *See Hill* v. *Moss-American, Inc.,* 309 F. Supp. 1175, 1177 n.6 (N.D. Miss. 1970).

[19]*See, e.g.,* 28 U.S.C. § 1445 (1982) (certain actions against railroads arising under state workmen's compensation laws); 15 U.S.C. § 77v(a) (1982) (actions under Securities Act of 1933).

provision to the contrary, and it is the responsibility of Congress, not of the courts, to speak on the matter if it wishes to foreclose removal of FLSA cases. We hold, therefore, that since the district court has original jurisdiction of the suit, and nothing in the FLSA or the general removal statute expressly prohibits the removal of FLSA actions, the case was properly removed pursuant to 28 U.S.C. § 1441.

C. FLSA Claims

Plaintiffs also assert that the district court erred in dismissing their claim to back pay and damages under certain Puerto Rico provisions which are allegedly "more beneficial" than the FLSA. In their view, section 218(a) of the FLSA, which permits states to adopt higher standards than those established by the Act,[20] grants plaintiffs as a matter of federal law the benfits of any existing Commonwealth laws that are more favorable to them. The district court rejected this argument on the grounds that the Puerto Rico laws upon which plaintiffs rely exempt federal employees from coverage, and that therefore plaintiffs did not have a cause of action under section 218(a). We agree.

First, we find plaintiffs' reliance on section 218(a) misplaced. Section 218(a) simply makes clear that the FLSA does not preempt any existing state law that establishes a higher minimum wage or a shorter workweek than the federal statute. It does not purport to incorporate

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[20] 29 U.S.C. § 218(a) (1982) provides in part that:

> No provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this [Act].

existing state law; and it certainly does not guarantee plaintiffs, as employees covered by the FLSA, the benefit of more favorable Puerto Rico laws that do not of their own force apply to federal employees. In order to prevail, plaintiffs cannot simply invoke section 218(a) but must also show that the more beneficial Commonwealth provisions actually apply to them. This they have failed to do.

Plaintiffs claim they are owed back pay under two sets of Puerto Rico provisions — title 29, section 245 *et seq.*, imposing minimum wage requirements, and title 29, section 271, *et seq.*, treating overtime hours and rates of compensation. As the district court concluded, however, these provisions do not apply to federal employees in Puerto Rico. First, "[p]ersons employed by the Government of the United States" are specifically excluded from coverage under the minimum wage provisions. *See* P.R. Laws Ann. tit. 29, § 246e (1985).[21] Second, while the statute is silent as to whether federal employees are also excluded from coverage under the overtime provisions, Commonwealth employees are exempted, *see* P.R. Laws Ann. tit. 29, § 285 (1985),[22] and the Puerto Rico government has given its

[20]Section 246e provides in part that:

> (a) This act shall not apply to:
>
> . . .
>
> (2) Persons employed by the Government of the United States of America or by the Government of the Commonwealth of Puerto Rico, with the exception of those agencies or instrumentalities of the latter which operate as private businesses or enterprises . . . .

[22]Section 285 provides in part that:

> The provisions of this Act shall not apply to the employees of the Commonwealth Government, the Municipal governments, the Government of the Capital, or of the agencies or instrumentalities of said governments, excepting such agenices or instrumentalities as are devoted to agricultural, industrial, commercial or public-service enterprises.

opinion on two separate occasions that federal employees were intended to be exempted as well.

As exhibits to their motion to dismiss, defendants submitted to the district court two opinion letters from the Commonwealth's Department of Labor and Human Resources.[23] In both, the Department adopted the view that the minimum wage and overtime provisions with which we are concerned did not apply to federal employees in Puerto Rico. According to the Department, the "legislative intention that prompted the enactment of both [sets of provisions] was to make them apply exclusively to the private enterprise and to local state government enterprises that function as private businesses." Moreover, it saw "no reason" to include federal employees under the laws while excluding Commonwealth employees. While these opinion letters do not have the force of law, they represent the views of the Department responsible for overseeing the enforcement of the provisions. *See* P.R. Law Ann. tit. 29, § 246. In the absence of any Commonwealth court decision discussing the applicability of section 285's exemption provision to federal employees, we rely on the government's views, particularly since we find them reasonable and plaintiffs have proffered nothing to persuade us otherwise.

The primary argument plaintiffs muster against this interpretation of the Puerto Rico provisions appears to be a constitutional one. Citing *Garcia* v. *San Antonio Me-*

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[23]The first letter, apparently written in response to an inquiry from the Office of the Judge Advocate, Department of the Army, at Fort Buchanan, is dated July 23, 1980, and is signed by the then Secretary for the Department of Labor and Human Resources, Carlos S. Quiros. The second letter, a response to an inquiry from the United States Department of Justice, District of Puerto Rico, is dated June 4, 1984, and is signed by Julio Cruz Rodriguez, Esquire, for the Solicitor of Labor.

tropolitan Transit Authority, 105 S.Ct. 1005 (1985), plaintiffs argue that the Commonwealth of Puerto Rico cannot exempt itself, and by extension the federal government, from its own statutes. We fail to see how *Garcia* is relevant to this case. *Garcia* held that the FLSA applies to state employees. Here, no one disputes the applicability of the federal statute to either federal or Commonwealth employees in Puerto Rico. Moreover, there is nothing unconstitutional about a state establishing different wage provisions for government employees than for their private sector counterparts so long as the laws are rationally based. *See generally* L. Tribe, *Constitutional Law* § 16-2 (1978) (classifications used in economic legislation are valid under the equal protection clause if rationally related to a legitimate public purpose). We therefore affirm the district court's dismissal of plaintiffs' claims brought under section 218(a) of the FLSA and the Puerto Rico laws.

While it is not entirely clear from the record before us, plaintiffs also appear to assert a claim for back wages and for overtime under 29 U.S.C. § 218(b)(2).[24] That is, it is possible that, while plaintiffs are not entitled to the benefit of the Commonwealth laws, they have a claim for back

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[24]Section 218(b)(2) provides:

> (2) any employee employed in a non-appropriated fund instrumentality under the jurisdiction of the Armed Forces, shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in section 206(a)(1) of this title (except that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation hourly rate not less than the overtime rate provided for in section 207(a)(1) of this title.

pay even under the FLSA standard. We are unsure whether this is so since plaintiffs have not specifically alleged exactly how defendants have violated section 218(b)(2). In its opinion, the district court appeared to recognize section 218(b)(2) as an additional basis for plaintiffs' claims but it did not reach this issue before dismissing the case. Now that the rather complex jurisdictional issues have been resolved, and it is clear that the case is properly before the district court, we direct the court to address the merits of this particular claim, assuming of course plaintiffs wish to press it.

We therefore hold that the district court has jurisdiction over plaintiffs' FLSA claims against FBICS and its subdivisions in respect to its nonappropriated funds, and accordingly we vacate the lower court's judgment dismissing plaintiffs' action. We affirm the district court's finding that the case was properly removed from the Superior Court of Puerto Rico. We also affirm the district court's dismissal of plaintiffs' claims brought under section 218(a) of the FLSA and the Puerto Rico laws. Finally, we remand for consideration of plaintiffs' possible section 218(b)(2) claim. Each party shall bear its own costs.

So ordered.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 85-1095.

ANGEL M. COSME NIEVES, ET AL.,
Plaintiffs, Appellants,

v.

COL. ROBERT C. DESHLER, ETC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: March 18, 1986

This cause came on to be heard on appeal from the United States District Court for the District of PUERTO RICO, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The district court's finding that the case was properly removed from the Superior Court of Puerto Rico and the district court's dismissal of plaintiffs' claims brought under section 218(a) of the FLSA and the Puerto Rico Laws are affirmed.

The judgment of the district court dismissing plaintiffs' action is vacated and the cause is remanded to the district court for consideration of plaintiffs' possible section 218 (b)(2) claim in accordance with the opinion filed this day.

Each party shall bear their own costs.

By the Court:

Francis P. Scigliano, *Clerk*.

FPI-MAR – 2-12-79-3M-1497

[cc: Messrs. Vazquez Matias, Willard and Reilly]

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§ 203. Definitions

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * *

1966 Amendment. Subsec. (d). Pub.L. 89-601, § 102(b), expanded the definition of employer to include a state or a political subdivision thereof with respect to employees in a hospital, institution, or school referred to in the last sentence of subsec. (4) of this section, or in the operation of a railway or carrier referred to in such sentence.

Subsec. (e). Pub.L. 89-601, § 103(a), excluded from the definition of "employee", when that term is used in the definition of the term "man-day", any agricultural employee who is the parent, spouse, child, or other member of his employer's immediate family and any agricultural hand harvest laborer, paid on a piece rate basis, who commutes daily from his permanent residence to the farm on which he is so employed, and who has been employed in agriculture less than 13 weeks during the preceding calendar year.

Subsec. (m). Pub.L. 89-601, § 101(a), added provisions for determining the wage of a tipped employee.

Subsec. (n). Pub.L. 89-601, § 215(a), struck out provision which directed that the definition of "resale" was not applicable when "resale" was used in subsection (s)(1) of this section.

Subsec. (r). Pub.L. 89-601, § 102(a), extended activities performed for a business purpose to include activities in the operation of hospitals, institutions for the sick, aged, or mentally ill or defective, schools for the handicapped, elementary and secondary schools, institutions of higher learning, or street, suburban, or interurban electric railway or local trolley or motorbus carriers if subject to regulation by a state or local agency regardless of whether public or private or whether operated for profit or not for profit.

Subsec. (s). Pub.L. 89-601, § 102(c), removed the gross annual business level tests of $1,000,000 for retail and service enterprises, street, suburban, or interurban electric railways or local trolley or motorbus carriers, and brought within the coverage of the gross annual business test all enterprises having employese engaged in commerce in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce, lowered the minimum gross annual volume test for covered enterprises from $1,000,000 to $500,000 for the period from Feb. 1, 1967, through Jan. 31, 1969, and to $250,000 for the period after Jan. 341, 1969, retained the $250,000 annual gross volume test for coverage of gasoline service establishments, and expanded coverage to include laundering or cleaning services, construction or reconstruction activities, or operation of hospitals, certain institutions for the care of the sick, aged, or mentally ill, certain special schools, and institutions of higher learning regardless of annual gross volume.

Subsec. (t). Pub.L. 89-601, § 101(b), added subsec. (5).

Subsec. (u). Pub.L. 89-601, § 103(b), added subsec. (u).

Subsec. (v), (W). Pub.L. 89-601, § 102(d), added subsecs. (v), (w).

§ 206. Minimum wage

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

* * *

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and sub-

contractors shall cause goods to be produced by home workers;

* * *

Wage rates superseded by recommendation of special industry committee

(c)(1) The rate or rates provided by subsection (a)(1) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Island s only for so long as and insofar as such employee is covered by a wage order (A) heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title, and (B) which prescribes a wage order rate which is less than the wage rate in effect under subsection (a)(1) of this section.

(2)(A) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is at least $2 an hour shall, except as provided in paragrpah (3), be increased –

(i) effective January 1, 1978, by $0.25 an hour or by such greater amount as may be recommended by a special industry committee under section 208 of this title, and

(ii) effectrive January 1, 1979, and January 1 of each succeeding year, by $0.30 an hour or by such greater amount as may be so recommended by such a special industry committee.

(B) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is less than $2 an hour shall, except as provided in paragraph (3), be increased –

(i) effective January 1, 1978, by $0.20 an hour or by such greater amount as may be recommended by a special industry committree under section 208 of this title, and

(ii) effective January 1, 19798, and January 1 of each succeeding year—

(I) until such wage order rate is not less than $2.30 an hour, by $0.25 an hour or by such greater amount as may be so recommended by a special industry committee, and

(II) if such wage order rate ius not less than $2.30 an hour, by $0.30 an hour or by such greater amount as may be so recommended by a special industry committee.

(C) In the case of any employee in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title, to whom the rate or rates prescribed by subsection (a)(5) of this section wuold otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the applicable increases prescribed by sub-paragraph (A) or (B) shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

(3) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a)(1) of this section which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection

shall be inapplicable to such employee and the applicable rate under subsection (a)(1) of this section shall apply to such employee.

(4) Each minimum wage rate prescribed by or under paragraph (2) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committee convened under section 208 of this title) fixing a higher minimum wage rate.

* * *

1966 Amendment. Subsec. (a). Pub.L. 89-601, § 301(a), inserted ", or is employed in an enterprise engaged in commerce or in the production of goods for commerce," in the opening provisions.

Subsec. (a)(1). Pub.L. 89-601, § 301(a), raised the minimum wage to not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966, and not less than $1.60 thereafter, except as otherwise provided in this section.

Subsec. (a)(4). Pub.L. 89-601, § 301(b), added subsec. (a)(4).

Subsec. (a)(5). Pub.L. 89-601, § 302, added subsec. (a)(5).

Subsec. (b). Pub.L. 89-601, § 303, substituted provisions for a minimum wage for employees covered for the first time by the Fair Labor Standards Amendments of 1966 (other than newly covered agricultural employees) at not less than $1 an hour during the first year from the effective date of the 1966 amendments, not less than $1.15 an hour during the second year from such date, not less than $13.0 an hour during the third year from such date, not less than $1.45 an hour during the fourth year from

such date, and not less than $1.60 an hour thereafter, for provisions setting a timetable for increases in the minimum wage of employees first covered by the Fair Labor Standards Amendments of 1961.

Subsec. (c). Pub.L. 89-601, § 304, provided for a percentage minimum wage increase for employees in Puerto Rico and the Virgin Islands who are covered by wage orders already in effect as the equivalent of the percentage increase on the mainland, provided for minimum wages for employees brought within coverage of this chapter for the first time by the Fair Labor Standards Amendemnts of 1966 at rates to be set by special industry committees so as to reach as rapidly as is economically feasible without substantially curtailing employment the objectives of the minimum wage prescribed for mainland employees, and eliminated the review committees that had been established by the Fair Labor Standards Amendments of 1961.

Subsec. (e). Pub.L. 89-601, § 305, added subsec. (e).

* * *

§ 207. Maximum hours

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a *workweek longer than forty hours unless* such employee receive compensation for his employment in excess of the hours above specified at a rate *not less than one and one-half times* the regular rate at which he is employed.

* * *

Historical Note

1961 **Amendment.** Subsec. (a). Pub.L. 87-30, § 6(a), designated existing provisions as subsec. (a)(1), inserted "in any workweek" therein, and added subsec. (a)(2).

Subsec. (b)(2). Pub.L. 87-30, § 6(b), substituted "in excess of the maximum workweek applicable to such employee under subsection (a) of this section" for "in excess of forty hours in the workweek."

Subsec. (d)(5), (7). Pub.L. 87-30, § 6(c), (d), substituted "in excess of this maximum workweek applicable to such employee under subsection (a) of this section" for "forty in a workweek" in par. (5) and "the maximum workweek applicable to such employee under subsection (a) of this section" for "forty hours" in par. (7).

Subsec. (e). Pub.L. 87-30, § 6(e), substituted "the maximum workweek applicable to such employee under subsection (a) of this section", "subsection (a) or (b) of section 206 of this title (whichever may be applicable" and "such maximum" for "forty hours", "section 206(a) of this title" and "forty in any", respectively.

Subsec. (f). Pub.L. 87-30, § 6(f), substituted "the maximum workweek applicable to such employee under such subsection" for "forty hours" in two instances.

Subsec. (h). Pub.L. 87-30, § 6(g), added subsec. (h).

* * *

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b. That part of the Judgment which ordered adjudged and decreed that the district court's dismissal of plaintiffs' claims brought under section 218(a) of the FLSA and the Puerto Rico Laws are affirmed:

3. The following statutes are invoked as basis of this appeal to the Supreme Court:

a. 28 U.S.C. 1254(1)
b. 28 U.S.C. 2101(c)
c. 28 U.S.C. Rules 10, 11, 13, 15, 23, 33 of the Supreme Court.

WHEREFORE Most respectfully pray that this Honorable Court take notice of this Notice of Appeal for all legal purposes and for all purposes deemed necessary by this Court.

At San Juan, Puerto Rico, May 31, 1986.

/s/

SAMUEL C. VAZQUEZ MATIAS
G.P.O. BOX 1218
SAN JUAN, PUERTO RICO 00936
TEL.: (809) 792-0867

HECTOR L. MARQUEZ
CHASE 416 PONCE DE LEON BLDG.
SUITE 240
HATO REY, PUERTO RICO 00918
TEL.: (809) 753-0355

Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I have mailed by placing same in a federal post office with enough air mail stamps affixed, a copy of the preceding motion to:

a The Solicitor General
Department of Justice
Washington, D.C. 20530

b) Mr. Vincent E. Reilly, Esq.
Civilian Personnel Litigation
Office of the Judge Advocate General
Department of the Army
Washington, D.C. 20310

c) Mr. Francisco A. Besosa, Esq.
Assistant U.S. Attorney
Federal Office Building, Suite 101
Chardón Avenue
Hato Rey, Puerto Rico 00918
(with regular mail stamps)

At San Juan, Puerto Rico, May 31, 1986.

/s/
SAMUEL C. VAZQUEZ MATIAS
G.P.O. BOX 1218
SAN JUAN, PUERTO RICO 00936
TEL.: (809) 792-0867

Of Counsel:

HECTOR L. MARQUEZ
CHASE 416 PONCE DE LEON BLDG.
SUITE 240
HATO REY, PUERTO RICO 00918
TEL.: (809) 753-0355

Mailed June 5, 1986